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IN THE

Supreme Court of the United States

October Term, 1944

No. 1138

BROTHERHOOD OF LOCOMOTIVE FIREMEN & ENGINEMEN ET AL.,

Petitioners,

vs.

INTERSTATE COMMERCE COMMISSION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

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Toledo, Ohio; March 30, 1945.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

Petitioners herein, Brotherhood of Locomotive Firemen and Enginemen et al., pray that a writ of *certiorari* issue to review the judgment of the United States Court of Appeals for the District of Columbia entered in the above case on January 15, 1945, which affirmed a judgment of the United States District Court for the District of Columbia, dismissing the complaint filed by the petitioners as plaintiffs in this action.

Opinions of Lower Courts

The opinion of the United States District Court for the District of Columbia is found on page 25 *et seq.* of the record, and that of the United States Court of Appeals

for the District of Columbia on page 34 *et seq.* Neither of these opinions has been officially reported up to the date of the preparation of this petition.

Jurisdiction

The judgment of the United States Court of Appeals for the District of Columbia was entered on January 15, 1945. The jurisdiction of this court is invoked under Section 240 of the Judicial Code as amended (U. S. C. Title 28, Section 347).

Statement of the Case

There has been no controversy regarding the facts out of which this case has arisen, which facts are as follows:

The Nevada Northern Railroad is a common carrier railroad line operating in the State of Nevada between two points known as Ruth and Cobre. It is a wholly owned subsidiary of the Kennecott Copper Corporation.

Kennecott owns large copper deposits at Ruth where a mine is operated, and also owns an ore treatment plant located at McGill, Nevada, some miles from Ruth. The actual operation of the mine and ore treatment plant is carried on by the Nevada Consolidated Copper Corporation, which is also a wholly owned subsidiary of Kennecott.

The method of operation is as follows: The mine at Ruth is an open pit mine. Ore is loaded directly at the site of mining operations on standard gauge railroad cars. These cars are then removed from the mine to a yard by means of special switch engines. In the yard they are made up into trains which proceed in a regular line-of-road movement over the tracks of the Nevada Northern Railroad to McGill. Here the trains are broken up and the

cars and their contents taken to the processing mill by other switch engines.

The controversy which gave rise to this case concerns only the line-of-road movements between Ruth and McGill, and the employees who operate the trains. Until 1920, these movements were carried on by the Nevada Northern Railroad under regular published tariffs. In that year, Congress enacted the Transportation Act which provided for the recapture of earnings from highly prosperous carriers for the purpose of the rehabilitation of weaker roads. In order to avoid this provision of the law, the Nevada Northern and the Copper Company entered into a so-called Trackage Agreement, by which, ostensibly at least, the Copper Company was to perform the ore movement in its own behalf over the tracks of the railroad. At that time the railroad company transferred the title of certain of its equipment to the Copper Company, and at the same time certain railroad employees, engineers, firemen, conductors, and brakemen, were also transferred from the payroll of the railroad to that of the Copper Company. This arrangement has continued to the present time.

The Railway Labor Act contains the following provision:

> "The term 'employee' as used herein includes every person in the service of a carrier (subject to its continuing authority to supervise and direct the manner of rendition of his service) who performs any work defined as that of an employee or subordinate official in the orders of the Interstate Commerce Commission now in effect, and as the same may be amended or interpreted by orders hereafter entered by the Commission pursuant to the authority which is hereby conferred upon it to enter orders amending or interpreting such existing orders: *Provided, however,* That no occupational classification made by order of the Interstate Commerce

> Commission shall be construed to define the crafts according to which railway employees may be organized by their voluntary action, nor shall the jurisdiction or powers of such employee organizations be regarded as in any way limited or defined by the provisions of this Act or by the orders of the Commission." (Section 1 Fifth, U. S. C. Title 45, Section 151 Fifth, 44 Stat. 577.)

This language formed a part of the original Railway Labor Act of 1926 and was re-enacted when the statute was amended in 1934. Other provisions added to the Act at that time conferred valuable rights on employees subject to it, and subsequent to 1934, a controversy arose regarding the status under it of the employees engaged in ore haul work over the line of the Nevada Northern Railroad. The employees contended that under the Trackage Agreement of 1920, as written and as applied in the actual carrying on of the service, they were in the service of the railroad company, were subject to its continuing authority to supervise and direct the manner of rendition of their services, that they performed work defined as that of employees in the orders of the Interstate Commerce Commission, and hence were entitled to the benefits of the Act. The carrier and the Copper Company contended that they were employees of the Copper Company only, and hence not within the statute. Thereupon, the employees applied to the Interstate Commerce Commission to exercise the authority conferred upon it by Section 1 Fifth of the Railway Labor Act, and to amend or interpret its existing orders in such manner as to define the work of the ore haul employees as being that of employees of a carrier, and to hold such employees within the purview of the Act.

At the same time a controversy existed involving the status of these same employees under the Railroad Retire-

ment Act.* The Railroad Retirement Board and the Interstate Commerce Commission held a joint hearing at which testimony was presented. It is of interest to note that the Railroad Retirement Board held that the employees in question were employees of the Nevada Northern Railroad and hence subject to the provisions of the Retirement Act. This decision was upheld in the courts (*Nevada Consolidated Copper Corporation vs. Railroad Retirement Board*, 129 F. (2d) 358, *certiorari* denied 317 U. S. 687).

The Interstate Commerce Commission, however, in a decision by Division 3, found that it had no jurisdiction (*Employees of the Nevada Consolidated Copper Corporation and/or Nevada Northern Railroad Company*, 246 I. C. C. 757). This decision was affirmed by the full Commission on rehearing, the opinion being reported in 255 I. C. C. 419, five Commissioners dissenting.

Thereafter this action was filed against the Commission, seeking a judicial declaration that it possessed the asserted jurisdiction and an order of the court directing its exercise. The complaint alleged in summary form the facts underlying the case presented to the Commission. (See R. 2-4.) In its answer the Commission admitted these allegations in substance (R. 19-23). Accordingly, there being no substantial issue of fact involved, cross-motions for summary judgment on the pleadings were filed. The motion of the plaintiffs was denied and the defendants' motion was granted. This decision of the District Court was sustained by the Court of Appeals. Two justices of that court concurred in a majority opinion, and Mr. Justice Arnold concurred in the result, but prepared a separate opinion expressing his views.

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* See the definition of the term "employee" contained in that statute (U. S. C. Title 45, Section 228a (b) and (c), which is very similar to that of the Railway Labor Act.

ISSUE INVOLVED

It should be kept clearly in mind that the plaintiffs in this action have not asked the courts to decide in this case the question of whether the involved employees are covered by the Railway Labor Act. They have asked a judicial decision to the effect that the Interstate Commerce Commission has jurisdiction to pass upon that question.

The single issue presented to the court, therefore, is this: When the Interstate Commerce Commission is asked to amend or interpret its existing orders defining the work of carrier employees in such manner as to include the services of certain employees within those orders, and a defense is raised that the employees in question are not employees of any carrier and hence not subject to the orders of the Commission, does the Commission have jurisdiction to pass upon the question of the existence of an employment relationship between the employees and a carrier?

The Commission has taken the position that it has no power to rule upon any question of employment *status* but that its authority is limited to matters of *classification* only, and this view has been adopted by the lower courts.

The petitioners contend that when jurisdiction once attaches to the Commission by virtue of a proceeding properly instituted to secure a ruling which is within the authority of the Commission to make, that tribunal has the power to decide any question necessary to be decided as a preliminary to the granting of the relief asked. Otherwise stated, when a determination of a question of employment status is necessary before one of employment classification can be decided, we submit that the jurisdiction of the Commission extends to both.

OUTLINE OF ARGUMENT

The Supreme Court should issue a writ of *certiorari* to review the decision of the Court of Appeals of the District of Columbia because:

I. The Court of Appeals erred in holding that the Interstate Commerce Commission has no jurisdiction to decide questions of employment status under the Railway Labor Act, because:

A. Jurisdiction exists in the Commission by necessary implication from the language of Section 1 Fifth of the Act.

B. Jurisdiction is shown by a consideration of the purposes of the Railway Labor Act taken as a whole.

C. Jurisdiction is established by the Commission's own acts and decisions.

II. The issue in this case is of such importance as to justify a review by this court.

III. The case presents an actual case or controversy and is not moot.

I. The Court of Appeals Erred in Holding That the Interstate Commerce Commission Has No Jurisdiction to Decide Questions of Employment Status Under the Railway Labor Act

A. Jurisdiction Exists in the Commission by Necessary Implication From the Language of Section 1 Fifth of the Act

Section 1 Fifth of the Railway Labor Act, above quoted, is a definition of the term "employee" as used in that statute. It establishes two prerequisites to which an individual must conform in order to enjoy the benefits of

the Act. First, he must be in the service of a carrier subject to its continuing authority of supervision and direction, and second, he must perform work "defined as that of an employee or subordinate official in the orders of the Interstate Commerce Commission now in effect and as the same may be amended or interpreted" by the Commission in the future.

It is clear that the authority expressly conferred upon the Commission by this section is that of *defining work*. It is equally clear that the work to be defined is that of employees and that the employees must be employees of a carrier. No one has ever contended that the Railway Labor Act authorizes the Commission to define the work of employees of the United States Steel Corporation or of any other industrial enterprise which is not a carrier.

Thus, the existence of an employment relationship between any employees whose work is sought to be defined and some carrier, is an essential prerequisite to any exercise of authority on the part of the Commission. The question as to whether such a relationship exists is accordingly implicit in every proceeding filed under Section 1 Fifth of the Railway Labor Act. If, as the Commission and the lower courts have held, the Commission's power extends only to the question of employee classification, and that body may not consider employee status, it is apparent that the Commission, if it acts at all, must proceed in total ignorance of its own power to act. Thus, there is an inherent absurdity in the decision below which is well expressed in the concurring opinion, as follows:

> "The majority reads these two acts (Railway Labor Act and Interstate Commerce Act) together to mean that the Interstate Commerce Commission has jurisdiction to classify the work of an employee of a carrier, but no jurisdiction to determine whether or not the employer of a person so classified is

> actually a carrier under the Act. This is like giving a naturalist the duty of classifying butterflies and at the same time depriving him of authority to determine whether the insects before him are butterflies or not. It would compel the Commission to classify the work of everyone who shovels coal without determining whether the persons so classified were shoveling coal in an interstate railroad operation. As a grammatical proposition this is possible. As a statutory interpretation it is beyond my ability to follow." (Material in parentheses not a part of quotation.)

The petitioners' basic argument in this case may be reduced to a brief summary statement, as follows: The Commission admittedly has a power of classification under Section 1 Fifth. This power extends only to employees of carriers. It is impossible, as a matter of jurisdiction and as a matter of inherent logic, for the Commission to attempt to classify any employees without knowing whether they are in fact employees of a carrier. Where a question arises as to this latter point, the Commission may decide it as a necessary adjunct to the jurisdiction expressly conferred.

It follows, therefore, that authority is vested in the Commission by the language of Section 1 Fifth itself. This conclusion is reinforced by a consideration of the general purposes of the Act, and the attitude of the Commission toward it in earlier cases. These matters will be developed further in the following sections of the argument.

B. Jurisdiction Is Shown by a Consideration of the Purposes of the Railway Labor Act Taken as a Whole

One of the distinctive features of the Railway Labor Act is the comprehensive nature of the administrative

remedies provided by that statute. Such remedies are available to meet practically all situations which may arise in the course of the bargaining relationship between men and management. Disputes involving the representation of employees may be handled by the National Mediation Board through the certification process provided in Section 2 Ninth (U. S. C. Title 45, Section 152 Ninth). Disputes regarding the negotiation of agreements may be handled through mediation (Section 5(a), U. S. C. Title 45, Section 155(a); arbitration (Sections 7, 8 and 9, U. S. C. Title 45, Sections 157, 158 and 159), or by special emergency boards (Section 10, U. S. C. Title 45, Section 160). Disputes regarding the interpretation or application of agreements already made are decided by the National Railroad Adjustment Board (Section 3, U. S. C. Title 45, Section 153).

While these administrative remedies are various in nature and effect, they provide an all-inclusive administrative machinery.

The only persons to whom these various remedies are available or who are required to resort to them are carriers and their employees. At the very threshold, therefore, of any of the administrative proceedings contemplated by the Act, it must appear by admission or decision that the parties to the controversy in question are in fact a carrier and its employees. Until this point is established, there is no one who can set the administrative machinery of the Act in motion. It does not appear reasonable that Congress could have intended to leave this highly significant question without any forum available to decide it. Yet this is the conclusion to which we are forced if the decisions of the lower courts are sustained. If the Interstate Commerce Commission has no jurisdiction to pass upon questions of employment status under

the Railway Labor Act, then no agency possesses that power.

It has been suggested that the National Mediation Board has jurisdiction to decide such matters. It must be remembered, however, that the basic authority of that body is, as its name implies, one of mediation, not decision. It may *decide* issues only when acting under the provisions of Section 2 Ninth. In proceedings instituted under this section, the Board probably has authority to determine the matter of employee status, in the course of deciding what employees are eligible to participate in a representation election, but the authority of the Mediation Board under Section 2 Ninth is strictly limited to cases involving representation disputes. It does not extend to cases like the present one where no such dispute is pending. It is clear, therefore, that the National Mediation Board has no general jurisdiction to determine the question of employment status.

It has been further suggested that the Interstate Commerce Commission has the power to decide this issue *under the Interstate Commerce Act,* but not under the Railway Labor Act. This suggestion was first made in the opinion in the *Nevada Northern* case (255 I. C. C. 419, 422), where the Commission indicated that if the railroad company "in fact, operated the ore trains as a common carrier by railroad, and employed the individuals engaged in the actual work on such trains, it may or may not have violated the provisions of that Act (the Interstate Commerce Act) as such carrier in respect of rates, regulations or practices, or with respect to the filing of schedules of its rates and charges for the transportation, in the making of reports to us, in the keeping of its records and accounts in accordance with our regulations, or in other respects."

Thereafter, the Commission intimated that it would entertain a proceeding brought under the Interstate Com-

merce Act to establish the existence of such violations, if any. The suggestion made in the opinion of the Commission was quoted in the majority opinion of the Court of Appeals, where it was stated that the real issue in the case "must turn upon the honesty, and hence the validity" of the Trackage Agreement between the railroad and the Copper Company. But we have never attacked the propriety of this agreement. We have merely contended that it, and the method of operation adopted under it have been such as to leave the power of supervision of employees in the hands of the railroad with the result that the employees are employees of the railroad *for the purposes of the Railway Labor Act.* Such a conclusion is wholly consistent with a finding that the agreement, when considered in relation to the provisions of the Interstate Commerce Act, is right and proper. The same argument is applicable to the suggestions made by the Commission and quoted above. It is a matter of no significance to the employees whether the rates or the operating or accounting practices required by the Interstate Commerce Act or the regulations of the Commission have been complied with in the premises or not. These are technical and specialized requirements relating to the purposes of the Interstate Commerce Act, which are to prevent extortionate charges and discriminatory practices, and to ensure an economically sound national transportation system. They have no connection with the matter of the supervision of employees, or the application of a statute whose purpose is the prevention of labor disputes which will directly interfere with the function of transportation. It is certainly a novel suggestion that the workers, who are not concerned with these technical matters, must nevertheless establish a violation of the Interstate Commerce Act in order to show that they are entitled to the benefits of another statute having a wholly different social purpose.

This is particularly true where a failure to prove any violation of the one Act would not necessarily establish that the employees are not included in the provisions of the other. Accordingly, the suggestion that a remedy exists for the employees through a proceeding filed before the Commission acting under the Interstate Commerce Act is a wholly illusory suggestion.

The final suggestion which might be made in this case is that the employees have available to them an additional remedy through an action for a declaratory judgment. We are by no means certain that declaratory relief could be granted by the courts in a case of this kind. Certainly no case has ever been filed for the purpose of securing such relief, and there is no precedent establishing that it would be proper. Even, however, if it can be assumed that such a remedy is in fact available, we have still failed to explain why Congress, in establishing the administrative procedure of the Railway Labor Act, should have left to the courts the determination of a preliminary matter necessary to be decided before the administrative machinery can be put in motion. Such an interpretation of the Act would attribute to Congress an intent quite the opposite of that expressed in most statutes establishing administrative tribunals, where the initial approach must be to such tribunals with a review in the courts, rather than a preliminary proceeding in the courts prior to resort to the administrative processes.

Accordingly it appears that none of the suggestions which have been made or could be made, rectify the hiatus in the Railway Labor Act asserted by the decisions of the Commission and of the lower courts in this case.

Where a statute devoted to the providing of comprehensive administrative remedies is held to have omitted from its provisions any administrative means whereby anyone can determine whether or not he is entitled to seek

such remedies, there is good reason to believe that the statute has been misconstrued.

Statutes, of course, have been enacted where by inadvertence essential elements have been omitted, and where such omissions cannot be rectified under any reasonable theory of statutory interpretation. Such is not the case here, however. The very paragraph which defines the term "employee" in the Railway Labor Act vests certain powers in the Interstate Commerce Commission with reference to the application of that definition. As above pointed out, the language used is susceptible to the interpretation that those powers include by necessary implication the authority to determine employee status in cases where such status is questioned. The fact that a contrary interpretation of this language will cause an important question to be withdrawn entirely from the field of administrative determination, which is typical of this whole statute, is an added reason for concluding that the Commission possesses the jurisdiction which it has disclaimed.

C. Jurisdiction Is Established by the Commission's Own Acts and Decisions

The present attitude of the Interstate Commerce Commission regarding the extent of its powers under Section 1 Fifth of the Railway Labor Act is a matter of recent development. As already noted, this section was originally enacted as a part of the Railway Labor Act of 1926. Two years after this statute was passed, a proceeding was instituted before the Commission to determine the status under the Act of certain employees of the Trunk Line Association. In this case the Commission was called upon to decide and did decide that an employment relationship existed between the involved employees and certain carriers. This is essentially the same decision which the

petitioners sought of the Commission in this case. See "*In the Matter of Regulations Concerning the Class of Employees and Subordinate officials That Are to be Included Within the Term 'Employee' Under the Railway Labor Act (Trunk Line Association case)*," 136 I. C. C. 321.*

As already pointed out, the Railway Labor Act was amended in 1934 after the decision in the *Trunk Line Association* case, and Section 1 Fifth was not changed but was re-enacted verbatim indicating congressional approval of the concept theretofore adopted by the Commission as to its jurisdiction under this paragraph.

From 1934 to 1941, the Commission exercised the precise authority whose possession it now denies in three cases: the *Red Cap* case, 229 I. C. C. 410; the *Fred Harvey* case, 230 I. C. C. 91, and the *Second Red Cap* case, 232 I. C. C. 49.

In 1941, 15 years after Section 1 Fifth became a part of our statutory law, the Commission for the first time asserted a lack of jurisdiction to decide questions of employment status in the *Hudson and Manhattan* case, 245 I. C. C. 415. Even here, however, this view represented the opinion of only four Commissioners. The remaining six who participated in the case were of the opinion that the Commission had jurisdiction but were divided among themselves on other points. This case was followed in quick succession by two others, the *Ore Dock* case, 246 I. C. C. 703, where the majority of the Commission disclaimed jurisdiction, three Commissioners dissenting, and the *Nevada Northern* case, out of which this action grew,

* The Interstate Commerce Commission Reports are somewhat confusing as to the captions given to cases arising under Section 1 Fifth of the Railway Labor Act. All are given the same title, and the same docket number (Ex Parte 72, Sub. 1). In recent years, however, the Commission has adopted the practice of adding the name of the asserted employer to the title. In order to distinguish the cases, we are using the same practice here as to all of the cases cited.

where there were five dissenters. An examination of these three decisions reveals that in one or another of them, seven out of the eleven participating Commissioners dissented on the jurisdictional question.

Thus, it appears that for many years the Commission exercised the jurisdiction now disclaimed by it without challenge either in the courts or in Congress. Its present view was first formulated less than six months prior to the decision in the *Nevada Northern* case, and has been opposed in the Commission by numerous and vigorous dissents.

Summary. To summarize the contentions of the petitioners as to the error inherent in the decisions below, we have pointed out, first, that the power of classification conferred by Section 1 Fifth of the Act necessarily includes a power to determine whether the employees sought to be classified are employees of a carrier; second, that the whole purport of the Railway Labor Act is that of establishing a comprehensive set of administrative remedies to meet all threats to the continuity of transportation which might grow out of labor disputes, and that it is unreasonable to believe that the Act made no provision for any general administrative mean of determining whether or not individuals are in fact employees of carriers entitled to the benefits of these administrative mechanisms, and third, that the present attitude of the Interstate Commerce Commission is a relatively new development which runs counter to long established administrative precedents established in the earlier cases before the Commission. As these earlier cases were not attacked in court, and roused no desire on the part of Congress to amend the statute, they establish the correctness of the Commission's original view that it had jurisdiction in cases of this sort.

II. The Issue in This Case Is of Such Importance as to Justify a Review by This Court

The effect of the final decision reached in this case will not be limited to the original controversy out of which the case developed. The situation existing on the Nevada Northern Railroad is but a phase of a more extensive problem which confronts railroad labor generally. This problem arises from the practice of certain carriers whereby they entrust the performance of various phases of their operations to contractors and thereafter insist that the employees on the contractor's payrolls are no longer subject to federal statutes governing railroad labor relations.

The railroad industry is peculiarly susceptible to such an arrangement. The successful performance of the business of railroading is the result of many separate operations far removed from one another in space, time and technique, but coordinated in results. Supervision of the individual operations of which the business is made up is necessarily indirect and remote. It is relatively easy to set aside one operation or another, entrust its nominal supervision to some other company, and still, by the use of competent local supervisors and the making of "suggestions" from time to time, retain in the railroad control over the employees which is as complete as it was before.

This procedure has been a prolific source of labor unrest. In 1922 it was a major contributing cause of one of the most serious strikes in railroad history.* It was roundly condemned by the United States Railroad Labor Board in its decision rendered in the case of *Railway Employes' Department vs. Indiana Harbor Belt Railroad Company*, 3 U. S. R. L. B. 332, and in an order issued in

* See Wolf, "Railroad Labor Board," (published by the University of Chicago Press), pp. 231-233 and 234.

the hope of forestalling the strike above mentioned (3 U. S. R. L. B. 1137-1139).

The practice did not cease with the repeal of the Transportation Act of 1920 under which it originated. It still exists. The Railroad Retirement Board, which is the tribunal entrusted with the administration of the Railroad Retirement Act and the Railroad Unemployment Insurance Act, is meeting it constantly. These statutes contain definitions of the term "employee" which are substantially the same as that of the Railway Labor Act. (Cf. Railroad Retirement Act, U. S. C. Title 45, Section 228a (b) and (c); Railroad Unemployment Insurance Act, U. S. C. Title 45, Section 351(d) and (e).) For the nature and variety of railroad operations which are handled through these so-called independent contractors, the court is referred to the Annual Reports of the Railroad Retirement Board for the years 1939 (p. 172); 1940 (pp. 183-184); 1942 (pp. 134-135), and 1944 (pp. 66-67). Without extending this brief by lengthy quotations from these reports, it is sufficient to note that many phases of railroad maintenance of way, and maintenance of equipment work, railroad terminal operations, and other services have been and are being performed in this manner.

The number and nature of these services is such as to indicate the existence of a serious problem. An extension of this contracting process may easily jeopardize the status under federal statutes of many employees now on railroad payrolls. The same situations as to which the Railroad Retirement Board has ruled in connection with its administration of the Retirement Act, present questions as to the applicability of the Railway Labor Act as well, but as pointed out in a prior section of this brief, there is no administrative tribunal empowered to pass upon them in relation to the latter statute if the decision of the lower court is sustained.

Naturally this case cannot decide the permissible limits of the contracting practice insofar as the Railway Labor Act is concerned. It can go far, however, in determining the forum wherein those limits can be ascertained. The employees have concluded that the remedy which Congress intended them to pursue under such circumstances, is to be found in a proceeding brought before the Interstate Commerce Commission under Section 1 Fifth. For reasons stated above, we believe that this conclusion is correct. In any event, however, the employees are entitled to an authoritative clarification of their position and a ruling on this point from the highest court empowered to pass upon it. We submit, therefore, that the question involved in this case is of vital importance in the field of railroad labor relations and merits consideration and decision by this court.

III. The Case Presents an Actual Case or Controversy and Is Not Moot

None of the parties to this case has questioned the existence of a justiciable controversy. In the Court of Appeals, however, the opinion of the concurring justice is based on the premise that no such controversy exists. Inasmuch as the point has been thus raised, we consider it desirable to discuss it briefly in connection with this petition.

In the concurring opinion below, we find the following statement:

> "There is no allegation that any right of the plaintiff unions or their members is being curtailed. Plaintiff unions seek no other relief than advice. This advice is not prerequisite to any relief which plaintiffs are now demanding from any administrative body. The case concerns only whether the Interstate Commerce Commission has jurisdiction to advise on the moot question whether the operation

> involved is that of an interstate carrier in order to inform plaintiffs of their future status under the Railway Labor Act.
>
> "Whether or not it would be proper for the Commission to advise plaintiffs under these circumstances cannot be determined in these proceedings. There is no case 'of actual controversy' before the District Court. It has, therefore, no jurisdiction. It should volunteer no opinion on the merits."

With all due respect, we find ourselves unable to follow this reasoning. It is, of course, true that the Interstate Commerce Commission was asked to grant no relief to anyone, other than the issuance of an order amending or interpreting existing orders defining the work of the employees in question as being that of employees of a carrier. It does not follow, however, that had such an amendment or interpretation been issued by the Commission it would have amounted to mere advice. The Commission's action was asked in order to establish the existence of an employment status which when established, would have entitled those occupying that status to definite legal rights. Those rights would not have arisen from the Commission's order itself but from the statute. This fact, however, does not render the case before the Commission moot, or degrade any order issued by it to mere advisory status. This conclusion is amply supported by a consideration of other sections of this same statute, and the nature of the administrative action taken thereunder. Section 1 First of the Railway Labor Act contains the statutory definition of the term "carrier." The statute then exempts certain interurban electric railways from this definition, and provides that "The Interstate Commerce Commission is hereby authorized and directed upon request of the Mediation Board or upon complaint of any party interested to determine after hearing whether any

line operated by electric power falls within the terms of this proviso."

It is apparent that under this section, the Commission has no more power to grant comprehensive "relief" than it does under Section 1 Fifth. A determination made by the Commission under this provision has come before the court for review and for a determination of its legal effect. In the case of *Shields vs. Utah Idaho Central R. Co.*, 305 U. S. 177, it was held that the Commission's decision had definite legal significance and constituted a reviewable administrative action, the court saying:

> "For, while the determination is made by the Interstate Commerce Commission for the purposes of the Railway Labor Act and not for further proceedings by the Commission itself, it is none the less a part of a regulatory scheme. It has the effect, if validly made, of subjecting the respondent to the requirements of the Railway Labor Act which was enacted to regulate the activities of transportation companies engaged in interstate commerce." (Page 183.)

Another example of this same sort of situation is to be found in Section 2 Ninth of the Railway Labor Act, which vests in the National Mediation Board the duty of ascertaining and certifying the choice of employees in the matter of representatives. The Board can grant no "relief" of any kind, to anyone, through any order. As stated by this court in the case of *Virginian Railway Company vs. System Federation No. 40*, 300 U. S. 515, 562, "The National Mediation Board makes no order. The command which the decree of the court enforces is that of the statute, not of the Board." Surely, however, it could not be contended that all cases coming before the National Mediation Board under Section 2 Ninth seek advice only and are moot cases.

No substantial difference is apparent between the nature of the powers of the Interstate Commerce Commission under Section 1 Fifth and those exercised by it under Section 1 First, or by the National Mediation Board under Section 2 Ninth. Under any of these statutory provisions, the administrative action contemplated, has the effect of establishing some prerequisite to the attaching of rights or duties under the statute. Final vindication of those rights and duties in connection with the particular controversy is left to other proceedings and other tribunals, administrative or judicial. This fact does not mean that the decisions and findings issued in connection with these statutory provisions are merely advisory, nor that the proceedings seeking them present moot questions.

The concurring justice, however, carried his reasoning even further than above indicated. He appears to have concluded that as the case before the Commission was moot, any case in court seeking to compel the Commission to exercise the asserted jurisdiction must also be moot. This reasoning loses sight of the fact that whatever the nature of the order sought from the Commission, and whatever the nature of the proceedings before it, if the statute is construed as conferring jurisdiction upon the Commission to entertain such a proceeding and issue such an order, the Commission's refusal to do so gives rise to an actual justiciable controversy between the plaintiffs and the Commission. There is no basic reason in the constitution or in general principles of law excluding administrative agencies from issuing declaratory or even advisory rulings if such rulings are permitted or required by the special statutes which authorize them to act. (See Report of the Committee on Administrative Procedure Appointed by the Attorney General, etc. Senate Document No. 8, 77th Cong., 1st Session, pages 30-33.) Where an administrative tribunal is empowered by Congress to act in a

given situation but declines to do so in the mistaken belief that it has no jurisdiction, certainly the aggrieved party has a remedy in the courts, who may determine whether the asserted jurisdiction exists or not. Otherwise the administrative tribunal would be the final arbiter of its own powers and the final authority on the question of the interpretation of the statute under which it acts.

Accordingly, it follows that this action presents to the courts a very real justiciable controversy and not a moot issue.

CONCLUSION

In the foregoing argument we have shown the court:

First, that the Interstate Commerce Commission has jurisdiction to determine questions of employment status in proceedings filed under Section 1 Fifth of the Railway Labor Act, and that the Court of Appeals erred in reaching a contrary conclusion. The power of classification admittedly conferred by Section 1 Fifth is limited to employees of a carrier and cannot be exercised without a determination as to whether the employees in question are in fact employees of a carrier. Further it is the purpose of the Railway Labor Act to provide a complete set of administrative remedies to operate in cases of disputes between carriers and their employees and it could scarcely have been the intention of Congress to establish no administrative means for determining whether the parties to any dispute are indeed carrier and employees. If Section 1 Fifth does not provide such means of determination, no other section of the statute can be found which does make such provision. Finally, we have shown that the Interstate Commerce Commission recognized jurisdiction in itself for many years and exercised the same without judicial or legislative attack and that its present recent position represents the steadfast opinion of only a minority of its members.

Second, we have shown the vital importance of this case in determining the forum which will decide the permissible limits of the practice of contracting out railroad work, a practice already extensive and one whose further extension would jeopardize the legal position of large groups of railroad employees. It is important that these employees have available a certain means of vindicating their rights. This certainty is what the court is asked to establish in this case.

Third, we have shown that there exists an actual controversy between the petitioners and the Commission which constitutes a justiciable case and not one presenting a moot issue to the courts.

In light of all the foregoing, it is respectfully submitted that the above petition for the issuance of a writ of *certiorari* to the Court of Appeals for the District of Columbia be granted.

Respectfully submitted,

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Toledo, Ohio, March 30, 1945.